IN THE

Supreme Court of the United States

OCTOBER TERM, 1948

No. 521

MARGARET E. SMITH
and
RUTH SCHUCHMAN,

Petitioners,

vs.

STATE OF MARYLAND,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND, AND BRIEF IN SUPPORT OF PETITION

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TO THE HONORABLE, JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioners, Margaret E. Smith and Ruth Schuchman, respectfully pray that a writ of certiorari may issue to review the final decision of the Court of Appeals of Maryland in this matter.

I.

SUMMARY STATEMENT OF THE MATTER INVOLVED

Petitioners were indicted on or about January 21, 1948, on two criminal indictments of fifteen counts each, charging them with unlawfully making and selling books or

pools on horse races and with keeping a house for the purpose of betting and gambling. On February 3, 1948, petitioners seasonably filed a Motion to Quash the Search Warrant and to suppress the evidence illegally and unlawfully obtained thereunder and for return of the property seized. Testimony was taken by the trial Court subject to exception and petitioners throughout the trial made a number of motions to strike out the evidence discovered, but upon each of these motions the learned Court reserved its ruling and finally at the conclusion of the entire case considered the Motion to Quash the Search Warrant and those to strike out the evidence unlawfully obtained and overruled them, to which action of the Court an exception was noted by petitioners. Petitioners contend that the search warrant was a general search warrant, in that it authorized and directed the police to search all persons found on the premises and the premises themselves, without naming or describing the place or the person in special to be searched. Petitioners were found guilty and fined Two Thousand Dollars each and costs. An appeal was taken to the Court of Appeals of Maryland, which appeal was directed primarily at the lower Court's action in overruling petitioners' Motion to Quash the Search Warrant and suppress the evidence obtained thereunder. After the filing of briefs and argument, the Court of Appeals of Maryland affirmed the findings and rulings of the lower Court. The opinion is not yet officially reported, but see, however, 62 A. 2d p. 287 and pp. 66-74 of the Appendix. Upon application the Honorable Herman M. Moser, Associate Judge of the Supreme Bench of Baltimore City, the trial Judge, stayed the mandate of the trial Court pending the determination by this Honorable Court of this petition.

II.

JURISDICTIONAL STATEMENT

Petitioners present this petition pursuant to Section 1257(3) and Section 2106 of revised Title 28, United States Code, approved June 25, 1948, and within the time prescribed by Rule 38½ of the Revised Rules of the Supreme Court of the United States.

Writ of certiorari is sought to review the final judgments entered on November 10, 1948, in the Court of Appeals of Maryland, which is the highest Court of said State, in the cause in that Court entitled No. 2, October Term, 1948, *Margaret E. Smith and Ruth Schuchman v. State of Maryland.*

The nature of the case and the rulings below which bring the case within the jurisdictional requirements of Section 1257(3) and Section 2106, appear from the following.

Petitioners asserted in their Motions to Quash the Search Warrant and to suppress the evidence illegally and wrongfully obtained thereunder, which were filed in advance of the trial of the case, that there had been a denial to them of their rights under the Constitution of the United States. The trial Court reserved its ruling upon each of these motions and at the conclusion of the trial overruled them. Testimony was taken subject to an exception and the petitioners throughout the trial made a number of motions to strike out the evidence obtained by the illegal entry and these motions were also overruled and exceptions were taken.

On appeal to the Court of Appeals of Maryland the denial of a constitutional right was again asserted, but in affirming the judgment of the trial Court, the Court of Appeals

referred only to the Bill of Rights in the Maryland Constitution.

The claim asserted by the petitioners and denied by the said Courts of Maryland is that they have been denied the protection of the rights guaranteed by the Fourth and Fourteenth Amendments to the Constitution of the United States, and by Articles 22 and 26 of the Maryland Bill of Rights, in that the warrant was "a John Doe" warrant without describing with reasonable particularity the individual, building, apartment, premise, place or thing to be searched. Further, that the warrant was general in character and that a search and seizure pursuant to such a warrant is inherently repugnant to the Fourth Amendment and to the fundamental personal rights and liberties which are protected by the Fourteenth Amendment to the Constitution of the United States.

The following cases, among others, sustain the jurisdiction of this Court where there has been an invasion of a fundamental right.

Ashcraft v. Tennessee, 322 U. S. 143, 64 S. Ct. 921, 88 L. Ed. 1192;
Murdock v. Pennsylvania, 319 U. S. 105, 63 S. Ct. 870, 87 L. Ed. 1292;
Thornhill v. Alabama, 310 U. S. 88, 60 S. Ct. 736, 84 L. Ed. 1093.

Further, when the question presented to the Court is whether or not a constitutional right has been denied, this Court has the power to make an independent examination and determination of the facts.

Craig v. Harney, 331 U. S. 367, 373, 67 S. Ct. 1249, 1253, 91 L. Ed. 1546;
Norris v. State of Alabama, 294 U. S. 587, 590, 55 S. Ct. 579, 580, 79 L. Ed. 1074;

Pierre v. State of Louisiana, 306 U. S. 354, 358, 59 S. Ct. 536, 538, 539, 83 L. Ed. 757;
Lisenba v. People of State of California, 314 U. S. 219, 237, 238, 62 S. Ct. 280, 290, 291, 86 L. Ed. 166.

III.

QUESTIONS PRESENTED

The questions for review upon certiorari are:

1. Was there a sufficient showing of probable cause to authorize and justify the issuance of the search warrant?

2. Was the search warrant a general search warrant?

3. Can two separate and distinct homes or dwelling premises be searched under a search warrant which does not describe either in particular?

4. Were the petitioners deprived of fundamental rights guaranteed to them by the Fourteenth Amendment to the Constitution of the United States?

5. Where the guaranties under the Declaration of Rights of the Maryland Constitution are in pari materia with the guaranties under the Fourth and Fifth Amendments to the Constitution of the United States, can these guaranties be abrogated by the State?

IV.

REASONS FOR GRANTING THE WRIT

The reasons relied on by petitioners for allowance of the writ of certiorari in this case may be summarized as follows:

1. That the Court of Appeals of Maryland in affirming the decision of the lower Court, decided the questions involved in a way not in accord with the applicable decisions of this Court.

2. That the due process clause of the Fourteenth Amendment requires that State criminal proceedings shall be consistent with the fundamental principles of justice and that protection against general warrants, writs of assistance and unreasonable searches and seizures are among the fundamental principles protected by the Fourteenth Amendment to the Constitution of the United States.

3. That under the search warrant in issue there was a search of two separate and distinct dwellings or homes without describing either in particular.

4. That to sustain the search warrant in the instant case gives rise to the issuance of general warrants on purely hearsay evidence.

5. That the question of probable cause in the instant case was determined by the affiant and was not determined by a judicial officer charged with that duty and this interpretation by the Court of Appeals of Maryland discriminates against the petitioners in respect to matters of substantive right rather than those of procedure.

6. That the protection and the rights guaranteed under Articles 22 and 26 of the Bill of Rights of the Maryland Constitution, which have been declared to be in *pari materia* with the Fourth and Fifth Amendments to the Constitution of the United States, may not be abrogated, denied or abridged.

V.

STATUTES INVOLVED

Article 22, Declaration of Rights of Maryland:

> "That no man ought to be compelled to give evidence against himself in a criminal case."

Article 26, Declaration of Rights of Maryland:

> "That all warrants, without oath or affirmation, to search suspected places, or to seize any person or property, are grievous and oppressive; and *all general warrants to search suspected places, or to apprehend suspected persons, without naming or describing the place, or the person in special, are illegal, and ought not to be granted.*"

Article 27, Section 306, Flack's Annotated Code of Maryland:

> "Whenever it be made to appear to any Judge of the Supreme Bench of Baltimore City * * * by a writing signed and sworn to by the applicant, that there is probable cause, the basis of which shall be set forth in said writing, to believe that any misdemeanor or felony is being committed by any individual or in any building, apartment, premises, place or thing within the territorial jurisdiction of such Judge * * * or that any property subject to seizure under the criminal laws of the State is situated or located on the person of any such individual or in or on any such building, apartment, premises, place or thing, then such Judge * * * may forthwith issue a search warrant directed to any duly constituted policeman, constable or police officer authorizing him to search such suspected individual, building, apartment, premises, place or thing, and to seize any property found liable to seizure under the criminal laws of this State, provided that *any such search warrant shall name or describe, with reasonable particularity, the individual, building, apartment, premise, place or thing to be searched*, the ground for such search and the name of the applicant on whose written application as aforesaid, the warrant was issued. * * *."

Article 35, Section 5, Flack's Annotated Code of Maryland:

> "No evidence in the trial of misdemeanors shall be deemed admissible where the same shall have been

procured by, through, or in consequence of any illegal search or seizure or of any search and seizure prohibited by the Declaration of Rights of this State; nor shall any evidence in such cases be admissible if procured by, through or in consequence of a search and seizure, the effect of the admission of which would be to compel one to give evidence against himself in a criminal case."

AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES

"Article IV. The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

"Article V. No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

"Article XIV. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

VI.

TRANSCRIPT OF RECORD AND SUPPORTING BRIEF

Petitioners submit with this petition a certified copy of the transcript of record, and a brief in support of this petition, included in which is a certified printed copy of the opinion of the Court of Appeals of Maryland in this matter.

WHEREFORE, your petitioners respectfully pray that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the Court of Appeals of Maryland, commanding that Court to certify and to send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket, No. 2, October Term, 1948, *Margaret E. Smith and Ruth Schuchman v. State of Maryland,* and that the said decree of the Court of Appeals of Maryland may be reversed by this Honorable Court, and that the motion to quash the search warrant and exclude the evidence illegally obtained be sustained, and that your petitioners may have such other and further relief in the premises as to this Honorable Court may seem meet and just; and your petitioners will ever pray.

Respectfully submitted,

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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

OPINION IN THE COURT BELOW

The opinion of the Court of Appeals of Maryland has not yet been reported officially. It appears in 62 A. 2d 287 and a certified copy at pages 66-74 of the Appendix.

JURISDICTION

The facts and statutory provision supporting the jurisdiction of this Court are set forth in the petition, supra pp. 3-5 and in the interest of brevity will not be repeated.

STATEMENT OF THE CASE

The material facts are stated in the petition for certiorari under the heading Summary Statement of Matters Involved, pages 1-2, and for the sake of brevity will not be repeated here.

ARGUMENT

I.

There Was Not A Sufficient Showing Of "Probable Cause" Set Forth In The Affidavit To Authorize And Justify The Issuance Of The Search Warrant.

The search and seizure warrant was void, illegal, and defective and illegally issued because the observations and an alleged telephone conversation set forth in the affidavit and application for the search warrant were not made by the affiant, Captain Alexander L. Emerson of the Baltimore Police Department, but was based upon a report made to him by one of his subordinate officers, Gerald Dolan.

In substance the report alleges that on January 9, 10, 11 and 12, 1948, Officer Gerald Dolan made certain observations, namely, that between the hours of 12 noon and 1 P. M. and 5 P. M. and 6 P. M. of said days (save and except Sunday, January 11, 1948) he saw a white man who is described as being about 42 years of age, about 5 feet 9 inches tall, weighing about 165 pounds, carrying an Armstrong scratch sheet and a Daily Racing Form, walking East on 20th Street and upon reaching the said premises *"hesitated momentarily and acted suspiciously by looking about as if to ascertain if he was being watched or followed, then entered the said premises."* That on said days later in the afternoons between the hours of 5 P. M. and 6 P. M. the same alleged described man came out of the premises and hurriedly walked from the vicinity. The identical con-

duct being described as a daily routine save as to different times of day. And that on January 12, 1948, at about 2:30 P. M. the officer called telephone number Hopkins 4453, listed as being installed in the said premises and the said telephone was almost immediately answered by a male voice who said "Hello", to which the officer said "This is Bill. Give me five to win on Mumbo Jumbo in the 7th at Gulfstream," and the said male voice replied "OK, Bill, is that all?" It is to be noted that Mumbo Jumbo is the name of a race horse entered to run in the 7th race at the Gulfstream Park Race Track on the said date, and in horse race parlance five to win means that five dollars is bet on the said horse to come in first (App. pp. 15-22). (Italics ours.)

Article 26 of the Declaration of Rights of Maryland, which has been consistently construed by the Court of Appeals of Maryland to be in *pari materia* with the Fourth Amendment to the Constitution of the United States, provides as follows:

> "That all warrants, *without oath or affirmation,* to search suspected places, or to seize any person or property, are grievous and oppressive; and *all general warrants to search suspected places, or to apprehend suspected persons, without naming or describing the place, or the person in special, are illegal, and ought not to be granted.*"

In addition to the above article of the Declaration of Rights, Article 27, Sec. 306, and Article 35, Sec. 5, Flack's Annotated Code of Maryland, provide as follows:

> Article 27, Sec. 306.
>
> "Whenever it be made to appear to any Judge of the Supreme Bench of Baltimore City * * * *by a writing signed and sworn to by the applicant,* that there is probable cause, *the basis of which shall be set forth in said writing,* to believe that any misdemeanor or felony is

being committed by any individual or in any building, apartment, premises, place or thing within the territorial jurisdiction of such Judge * * * or that any property subject to seizure under the criminal laws of the State is situated or located on the person of any such individual or in or on any such building, apartment, premises, place or thing, then such Judge * * * may forthwith issue a search warrant directed to any duly constituted policeman, constable or police officer authorizing him to search such suspected individual, building, apartment, premises, place or thing, and to seize any property found liable to seizure under the criminal laws of this State, provided that *any such search warrant shall name or describe, with reasonable particularity, the individual, building, apartment, premise, place or thing to be searched,* the ground for such search and the name of the applicant on whose written application as aforesaid, the warrant was issued. * * *"

Article 35, Sec. 5.

"No evidence in the trial of misdemeanors shall be deemed admissible where the same shall have been procured by, through, or in consequence of any illegal search or seizure or of any search and seizure prohibited by the Declaration of Rights of this State; nor shall any evidence in such cases be admissible if procured by, through or in consequence of a search and seizure, the effect of the admission of which would be to compel one to give evidence against himself in a criminal case."

The provision of Article 26 of the Declaration of Rights (Supra) clearly provides that all warrants "without oath or affirmation" are "grievous and oppressive", however, Captain Emerson in the application for the search and seizure warrant in the present case, averred that from the hearsay evidence that it was *"his information and belief"* there was *"probable cause to believe"* etc. Warrants so

issued, based upon *"information and belief"* have long been condemned and have never been sanctioned by Federal authorities.

Schenks v. U. S., 2 Fed. 2d 186;
Boyd v. U. S., 116 U. S. 616, 624-630, 6 S. Ct. 524, 29 L. Ed. 646.

In *Veeder v. U. S.*, 252 Fed. 414 (C. C. A. 7) Baker J. held:

> *"No search warrant shall be issued unless the Judge has first been furnished with the facts under oath—not suspicions, beliefs or surmises—but facts* which when the law is properly applied to them, tend to establish the necessary legal conclusion, or facts when the law is properly applied to them, tend to establish probable cause for believing that the legal conclusion is right. The inviolability of the accused's home is to be determined by facts, not by rumor, suspicion, or guesswork. If the facts afford the legal basis for the search warrant, the accused must take the consequences. But equally there must be consequences for the accuser to face. If the sworn accusation is based on fiction the accuser must take the chance of punishment for perjury. Hence the necessity of a sworn statement of facts, because one cannot be convicted of perjury for having a belief, though the belief be utterly unfounded in fact and law." (Italics ours.)

Suffice to say that the application for the search warrant in this case fails to set out any of the essential requirements necessary for a valid search warrant under either the State or Federal law. To uphold the validity of a warrant based on such an application would undermine the very right and protection which is guaranteed by the Constitution of Maryland and is reinforced by the guaranties contained in the Fourteenth Amendment to the Constitution of the United States.

A state cannot take away from its citizens the fundamental rights and privileges which the Constitution of the United States guarantees to the citizen. To permit this application for a search warrant to stand would in effect subvert the rights guaranteed by both State and Federal Constitutions. The right to freedom from unreasonable searches and seizures becomes an illusory one, if a warrant can be issued on "belief and information" which in turn, is based on hearsay evidence.

The result and effect of the decision of the Court of Appeals of Maryland is to deprive in a single stroke the rights and protections guaranteed by both the State and Federal Constitutions. Heretofore, the Maryland Court has not been hesitant in applying the more rigorous Federal rule. Even in cases where the application has been based on the personal knowledge of the affiant the Court has carefully scrutinized the facts and circumstances, to which the affiant swore, to determine if there was any illegal or unlawful activity taking place, or, circumstances which would lead a reasonable man to so believe.

> *Goodman v. State,* 178 Md. 1, 8-10, 11 A. 2d 635;
> *Allen v. State,* 178 Md. 269, 276-278, 13 A. 2d 352;
> *Frankel v. State,* 178 Md. 553, 557, 16 A. 2d 93;
> *Riley v. State,* 182 Md. 415, 35 A. 2d 171.

In the instant case there was no observation or detection of unlawful or illegal activity and no circumstances to warrant a man of prudence and caution in believing that the offense has been committed or is being committed, which the Court of Appeals said existed in the above cited cases.

Petitioners, therefore, contend that there was no sufficient showing of probable cause set forth in the affidavit to authorize and justify the issuance of the search warrant;

and that the warrant was not issued on "oath or affirmation" as required by the Declaration of Rights of Maryland; and that the issuance of the search warrant in the instant case was in derogation and abrogation of the rights and protection guaranteed by Article 26 of the Declaration of Rights of the Maryland Constitution and also of the fundamental rights secured to the petitioners by the Fourth and Fourteenth Amendments to the Constitution of the United States.

II.

The Search Warrant Was A General Warrant.

The search warrant (App. pp. 23-27) in the instant case was a general search warrant in that it authorized and directed the said officer to search the premises at 430 E. 20th Street and all persons found on the premises. Such a search is condemned by Article 26 of the Declaration of Rights of Maryland and by Article 27, Sec. 306, of Flack's Annotated Code of Maryland.

> Article 26.
>
> "* * * and all general warrants to search suspected places, or to apprehend suspected persons, without naming or describing the place, or the person in special, are illegal, and ought not to be granted."
>
> Article 27, Sec. 306, Flack's Annotated Code.
>
> "* * * provided that any such search warrant shall name or describe, with reasonable particularity, the individual, building, apartment, premise, place or thing to be searched."

The warrant was in truth and fact "a John Doe warrant" in that the allegations of the alleged (fictional) man were described as:

> "* * * being about 42 years of age, about 5 feet 9 inches tall, weighing about 165 pounds, carrying an Armstrong scratch sheet and a Daily Racing Form,

walking east on 20th Street, and upon reaching the said premises, hesitated momentarily and acted suspiciously by looking about as if to ascertain if he was being watched or followed" (App. pp. 23-27).

and that the allegations were false and untrue, and that the action described above is expressed in a stock phrase and in a stereotype form of description and are set forth in numerous affidavits in other search warrants (App. pp. 27-38).

In the instant case, when the contention was made that the search warrant was in truth and fact a "John Doe warrant," using stock phrases and stereotyped forms of description and following a general form of affidavit, the trial Court (App. p. 38) said:

> "(The Court) Isn't this warrant somewhat like what we discussed before?
>
> (Mr. Maynard, Deputy State's Attorney) Yes.
>
> (The Court) **This one just says search all that are on the premises.** (Emphasis added.)
>
> (Mr. Maynard) It may be bad as to them, but I think it is good as to the person who was in charge of the premises. I think a search warrant can be good as to some, and bad as to others. I don't think because it has some provision in there which may be bad as to "C" and "D" that it is also bad as to "A" and "B".
>
> (Mr. Maynard) **I think these cases will result in the modification of all of the phrasing of all of the search warrants.** (Emphasis added.)
>
> (Mr. Ingram) This search warrant, if compared with other search warrants which your Honor has had before you in recent days will show that, with all due deference to some of the judges of the Supreme Bench who have been signing warrants, there has been a practice that has grown up here, and I venture to say, I shall make a proffer to your Honor, and I think it is admissible, your Honor would have to decide that at the proper time, but we have drifted into this form.

The search warrant your Honor had before you a few moments ago sets forth the same allegation as to the Armstrong scratch sheet and the Daily Racing Form and the man entering the premises at such and such a time, and looking around, acting suspiciously before entering the premises. That has become a stock phrase that is incorporated in most of the search warrants applying to bookmaking.

Likewise there is another paragraph in which I call your Honor's attention in the motion to quash the search warrant:

> 'It is to be noted that the said described man enters the said premises prior to the post time of the first horse race and leaves the said premsies at a time when most bet-taking activities conducted over the telephone have been concluded for the day; and that the papers he carried on entering are daily horse race publications generally used by bookmakers in the unlawful operation of bookmaking.'

(The Court) I get your point. I agree with you it would make more delightful summer reading if the phrases were varied a little, but that wouldn't of necessity make it bad if the affidavit actually set forth facts which amounted to probable cause."

It is only fair to conclude of this discussion that Mr. Maynard, Deputy State's Attorney of Baltimore City, admitted that the warrants would be modified in the future, and the petitioners made a proffer of similar warrants that had been issued in which the descriptions, stock phrases and stereotype forms were included. (Exhibit "B" and "C", App. pp. 27 to 38.)

This Honorable Court has repeatedly condemned the issue of warrants on loose, vague or doubtful bases of fact, as is so well set forth in *Go-Bart Importing Company v. U. S.*, 282 U. S. 344, where Mr. Justice Butler, speaking for the Court at p. 357, said:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated.

"It is general and forbids every search that is unreasonable; it protects all, those suspected or known to be offenders as well as the innocent, and unquestionably extends to the premises where the search was made and the papers taken. Gouled v. U. S., 255 U. S. 298, 307, 41 S. Ct. 261, 65 L. Ed. 647. The second clause declares: '*And no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.' This prevents the issue of warrants on loose, vague or doubtful bases of fact. It emphasizes the purpose to protect against all general searches. Since before the creation of our government, such searches have been deemed obnoxious to fundamental principles of liberty. They are denounced in the constitutions or statutes of every State in the Union.* Agnello v. U. S., 269 U. S. 20, 33, 46 S. Ct. 4, 70 L. Ed. 145, 51 A. L. R. 409. *The need of protection against them is attested alike by history and present conditions. The Amendment is to be liberally construed and all owe the duty of vigilance for its effective enforcement lest there shall be impairment of the rights for the protection of which it was adopted.*" Boyd v. United States, 116 U. S. 616, 623, 6 S. Ct. 524, 29 L. Ed. 746. Weeks v. United States, supra, pages 389-392 of 232 U. S., 34 S. Ct. 341. (Italics ours.)

The alleged telephone calls without any verification, have also been incorporated in search warrants, both in the instant warrant and in those set out in the Appendix (pp. 31, 36).

The Court of Appeals of Maryland has in the case of *Goodman v. State,* 178 Md. 1, 5, 11 A. 2d 635, 637, passed upon and affirmed a search warrant which is in marked contrast to the warrant in this case.

"Whereas it appears to me, the subscriber, an Associate Judge of the Supreme Bench of Baltimore City,

in and for the City aforesaid, by the written information and oath of Sergeant Ralph Amrein, of the City aforesaid, that said affiant has reasonable cause to believe, and does believe, that the law in relation to betting on horse races Section 247, Article 27, is being violated in premises known as 1230 W. North Avenue, Baltimore, Maryland, used, kept, rented or occupied by one Julie Markoff and Sol Goodman and that affiant has probable cause to suspect that books, slips, telephones and other material having to do with betting on horse races prohibited by Section 247, Article 27, are concealed in said premises known as 1230 W. North Avenue, in said City. You are, therefore, hereby commanded, with necessary and proper assistance, to enter, in the day time, into the said premises used, kept, rented or occupied by the said Julie Markoff and Sol Goodman, in the City aforesaid and there diligently to search for books, slips and paraphernalia, and other material having to do with betting on horse races prohibited by law; and if the same, or any part thereof shall be found upon such search, that you bring said books, slips and paraphernalia of the above description so found and also the body of the said Julie Markoff, and Sol Goodman, to me, the subscriber, or some Police Justice of the said State, in and for the City aforesaid, to be disposed of and dealt with according to law."

Such particularity of description as the statute requires is not to be found in the instant case. Here the command, direction and authority contained in the search warrant are as follows:

"You are, therefore, hereby commanded, with the necessary and proper assistants, to enter into the said premises at 430 E. 20th street, a three-story brick dwelling house; indicated in the October, 1947, issue of the Baltimore Address Telephone Directory as being equipped with telephone, Hopkins 4453, listed to Kenneth W. Hughes, 2nd floor; *and there diligently search the said premises and all persons found on the said premises * * * and the body of the said white man who*

> *is described as being about 42 years of age, about 5 feet 9 inches tall, weighing about 165 pounds; and all other persons who may be found in the said premises* who may be participating in the bookmaking activities, before me, the subscriber, or some Police Justice of the said State, in and for the City aforesaid, to be disposed and dealt with according to law." (Italics ours.)

Upon entering the premises in conformity with the directions set forth in the above search warrant, Captain Emerson proceeded to search the first floor premises, the private home of the petitioner, Margaret E. Smith. He then attempted to search and did put under arrest one Michael Picarelli, who came into the premises about half an hour after the search had begun. One Frank Dolan likewise came into the premises about half an hour after the search had begun and Captain Emerson proceeded to detain the said Frank Dolan (App. pp. 61-64). Captain Emerson inquired of Dolan if he had any bets and Dolan said "No". Captain Emerson then searched his pockets and took the book from him (App. pp. 57-64). Objection was made to the search of Dolan and this was later sustained by the trial Judge (App. pp. 63-65). Captain Emerson then went upstairs to the front room on the second floor, which was occupied by the petitioner, Ruth Schuchman as her private home (App. pp. 41-44) and searched her pocketbook, taking from her bills, receipts, bank deposit slips, pictures and other personal papers. He also proceeded to search her clothes closets, coats and other articles of apparel. The petitioner, Margaret E. Smith, had told Captain Emerson that she had nothing to do with the second floor and that it was the private dwelling of the petitioner, Ruth Schuchman (App. pp. 41-44). Captain Emerson also searched all of the pockets of Frank Dolan and likewise he compelled Frank Picarelli (App. pp. 63-65) to sit down and detained

him until the petitioner, Margaret E. Smith, sought his release.

This was a search of two separate and distinct dwellings or homes, the one occupied by the petitioner, Margaret E. Smith, and the other occupied by the petitioner, Ruth Schuchman, one situated on the first floor and the other situated on the second floor of the premises No. 430 E. 20th Street, Baltimore.

Nowhere in the search warrant are two separate homes or dwelling premises described in particular or authorized to be searched. Nowhere in the search warrant are Margaret E. Smith, Ruth Schuchman, Frank Dolan or Michael Picarelli described in special or described at all, and under what law and by what right or authority were they searched?

This warrant is a general warrant to apprehend suspected persons and search them and to search suspected places, without describing with reasonable particularity, the individual, building, apartment, premise, place or thing to be searched, condemned by Section 306 of Article 27 of Flack's Annotated Code of Maryland, and Article 26 of the Declaration of Rights of Maryland and the Fourth Amendment to the Constitution of the United States. Suffice to say, that measured by these requirements, this warrant was a general warrant and should not have been signed or granted by the learned Judge to whom application was made.

III.

The Petitioners Were Deprived Of Fundamental Rights Guaranteed To Them By The Fourteenth Amendment To The Constitution Of The United States.

The Court of Appeals of Maryland has by its pronouncement in the instant case, if such pronouncement be allowed to stand, without being challenged, has in its interpretation of the search and seizure law under which the issuance of such warrants is attempted to be authorized, rendered null and void every protection that was intended to be afforded under Article 26 of the Declaration of Rights and in direct violation of the rights and protection guaranteed under the Fourth Amendment to the Constitution of the United States and in deprivation of the limitations placed upon the States under the Fourteenth Amendment to the Constitution of the United States, in that it authorizes and allows warrants to be issued upon hearsay evidence, without oath or affirmation prescribed by said Article 26, and brings back into our constitutional form of government writs of assistance so rigorously condemned by James Otis and others and deprives petitioners of due process of law and renders all that we have acquired looking towards freedom but an empty gesture and would give only lip service to our most cherished rights preserved from the Magna Charta.

Nowhere in the statutes can justification be found for the issuance of the search warrant, in its form, on hearsay evidence or information and belief. And justification is incumbent upon the State of Maryland. Concerning such justification, Mr. Justice Bradley in *Boyd v. United States, (supra)*, cited *Entick v. Carrington*, 19 Howell's State Trials 1029, and characterized it as follows:

"The case, however, which will always be celebrated as being the occasion of Lord Camden's memorable discussion of the subject, was that of Entick v. Carrington and Three Other King's Messengers, reported at length in 19 Howell's State Trials, 1029. After describing the power claimed by the Secretary of State for issuing general search warrants and the manner in which they were executed, Lord Camden says:

> 'Such is the power, and therefore, one would naturally expect that the law to warrant it should be clear in proportion as the power is exorbitant. If it is law, it will be found in our books; if it is not to be found there, it is not law.'

" 'The great end for which men entered into society was to secure their property. That right is reserved sacred and incommunicable in all instances where it has not been taken away or abridged by some public law for the good of the whole. The cases where this right of property is set aside by positive law are various. Distresses, executions, forfeitures, taxes, etc., are all of this description, wherein every man by common consent gives up that right for the sake of justice and the general good. By the laws of England, every invasion of private property, be it ever so minute, is a trespass. No man can set his foot upon my ground without my license, but he is liable to an action though the damages be nothing; which is proved by every declaration in trespass where the defendant is called upon to answer for bruising the grass and even treading upon the soil. If he admits the fact, he is bound to show by way of justification, that some positive law has justified or excused him. The justification is submitted to the judges, who are to look into the books, and see if such a justification can be maintained by the text of the statute law, or by the principles of the common law. If no such excuse can be found or produced, the silence of the books is an authority, against the defendant, and the plaintiff must have judgment. Ac-

cording to this reasoning, it is now incumbent upon the defendants to show the law by which this seizure is warranted. If that cannot be done, it is a trespass.'"

The Supreme Court of Michigan in *People v. Marxhausen*, 204 Mich. 559, 564 stated:

"These events which we have but given in outline occurred within the memory of the men who formulated and adopted the Fourth Amendment. In clear and unmistakable language these men wrote *into the fundamental law of the nation* to be afterwards incorporated *into the fundamental law of the various States of the Union* the safeguard against unlawful and unreasonable search and seizure of the person and property of the citizen, irrespective of whether such unlawful and unreasonable search and seizure had the sanction of legislative approval or rested in the arbitrary will of the executive and administrative arm of the State."

In the language of this Honorable Court in *Weeks v. United States*, 232 U. S. 383, 391, 392:

"The effect of the Fourth Amendment is to put the courts of the United States and Federal officials, in the exercise of their power and authority, under limitations and restraints as to the exercise of such power and authority, and to forever secure the people, their persons, houses, papers and effects against all unreasonable searches and seizures under the guise of law. This protection reaches all alike, whether accused of crime or not, and the duty of giving to it force and effect is obligatory upon all entrusted under our Federal system with the enforcement of the laws. The tendency of those who execute the criminal laws of the country to obtain conviction by means of unlawful seizures and enforced confessions, the latter often obtained after subjecting accused persons to unwarranted practices destructive of rights secured by the Federal Constitution should find no sanction in the judgments

> of the courts which are charged at all times with the support of the Constitution and to which people of all conditions have a right to appeal for the maintenance of such fundamental rights."

Mr. Justice Frankfurter dissenting in *Davis v. United States*, 328 U. S. 528, 604, 67 S. Ct. 1256, 1267, clearly indicated that:

> "So basic to liberty is the protection against governmental search and seizure, that every State in the Union had this as a constitutional safeguard."

Again in *Harris v. United States*, 331 U. S. 145, 161, 67 S. Ct. 1098, 1106, Mr. Justice Frankfurter pointed out that:

> "If one thing on this subject can be said with confidence it is that the protection afforded by the Fourth Amendment against search and seizure by the police, except under the closest judicial safeguards, is not an outworn bit of Eighteenth Century romantic rationalism but an indispensable need for a democratic system."

In 1776 at the time of the adoption of the Declaration of Rights of Maryland, Paragraph 23, now known as Article 26, the minds of the framers of the Constitution were fresh with recollections of the havoc that had been created by writs of assistance and general search warrants, and it was their intention and it was contemplated by them that this Article 26, formerly Paragraph 23, was meant to give *wide* and *not limited* scope to this protection against police intrusion and liberally to safeguard the right of privacy.

The Court of Appeals of Maryland has since the rendition of its opinion in *Allen v. State*, 178 Md. 269, gradually emasculated, abridged and depleted every vestige of protection that was contemplated against police intrusion incorporated in this most revered and cherished protection

against unreasonable searches and general warrants unequivocally condemned therein.

For a very learned summation of the rights and protection guaranteed by the Fourth and Fifth Amendments to the Constitution, it might be well to quote the language of Mr. Justice Day in *Weeks v. United States,* 232 U. S. 383:

> "That such rights are declared to be indispensable to the 'full enjoyment of personal security, personal liberty, and private property'; that they are to be regarded as of the very essence of constitutional liberty; and that the guaranty of them is as important and as imperative as are the guaranties of the other fundamental rights of the individual citizen—the right to trial by jury, to the writ of habeas corpus, and to due process of law. It has been repeatedly decided that these Amendments should receive a liberal construction so as to prevent stealthy encroachment upon or 'gradual depreciation' of the rights secured by them, by imperceptible practice of course, or by well-intentioned but mistakenly over-zealous executive officers."

Congress has, since 1789, consistently respected the protection afforded by the Fourth Amendment by carefully limiting and restricting the authorization for and the use of search warrants (See *Davis v. U. S.,* 328 U. S. at p. 616, 66 S. Ct. at p. 1273). The safeguard afforded by Article 26 of the Declaration of Rights, which has been a part of the Constitution of Maryland since 1776, was further strengthened by the addition in 1939 of Article 35, Sec. 5 (supra), which forbade the introduction of evidence in the trial of a misdemeanor where the evidence was procured in any search and seizure prohibited by the Declaration of Rights.

The decisions of this Honorable Court and of other courts, the various acts passed by Congress since its establishment and by the State legislatures, all point clearly to one fact,

and that is, that the freedom of unreasonable searches and seizures is a fundamental right and one which demands at all times protection from invasion. What was fundamental in the time of *Entick v. Carrington* and in Colonial times (See *Commonwealth v. Dana,* 2 Metc. Mass. 329) is not less so today. This Court has consistently held that fundamental personal rights and liberties are protected by the Fourteenth Amendment from invasion by State action.

> *De Jonge v. Oregon,* 299 U. S. 353, 57 S. Ct. 255;
> *Powell v. Alabama,* 287 U. S. 45, 53 S. Ct. 55;
> *Near v. Minnesota,* 283 U. S. 697, 51 S. Ct. 625;
> *Chambers v. Florida,* 309 U. S. 227, 60 S. Ct. 472;
> *Chaplinski v. New Hampshire,* 315 U. S. 568, 62 S. Ct. 766.

When the Bill of Rights was the subject of heated debate, Thomas Jefferson, speaking of the guaranty contained in the Fourth Amendment, said:

> "The denial of the rights to a single individual jeopardizes the right of all."

IV.

Where The Guaranties Under The Declaration Of Rights Of The Maryland Constitution Are In Pari Materia With The Guaranties Under The Fourth And Fifth Amendments To The Constitution Of The United States, These Guaranties Cannot Be Abrogated By The State.

The Court of Appeals of Maryland since *Blum v. State,* 94 Md. 375, 382, 51 A. 26, 56 L. R. A. 322, in repeated decisions has consistently held that Articles 22 and 26 of the Declaration of Rights of Maryland are in pari materia with the Fourth and Fifth Amendments to the Constitution of the United States. The Court in the *Blum* case, after re-

viewing several leading English cases, *Boyd v. United States (supra)* and *Counselman v. Hitchcock,* 142 U. S. 547, rested its decision on "the exposition of the law contained in these two cases."

In *Miller v. State,* 174 Md. 362, 370-374, Judge Offutt speaking for an unanimous Court, said:

> "The reason for the condemnation of unreasonable search and seizure found in the Fourth Amendment of the Federal Constitution, in Articles 22 and 26 of the Maryland Bill of Rights, and in the constitutions of the several states, may be found in the apprehension, deeply implanted in the consciousness of the whole people, that the immunity should have some more substantial protection than the uncertain benevolence of the administrative and executive agents of the government."

In the more recent case of *Bass et al. v. State,* 182 Md. 496, 500, 35 A. (2d) 155, 157, the Court said:

> "Articles 22 and 26 of the Maryland Declaration of Rights are in pari materia with the Fourth and Fifth Amendments to the Constitution of the United States and the immunities hereby guaranteed are fairly summed up in Article 35, Sec. 5, of the Maryland Code." (Supra).

Again in *Wood v. State,* 185 Md. 280, 284, 285, 44 A. (2d) 859, 861, in construing Article 35, Sec. 5, and Article 27, Sec. 306, (Supra), held that they amounted to

> "adoption pro tanto of the Supreme Court decisions under the Fourth Amendment. Boyd v. United States, 116 U. S. 616, 29 L. Ed. 746; Weeks v. United States, 232 U. S. 383, 58 L. Ed. 652; Carroll v. United States, 267 U. S. 132, 69 L. Ed. 543. For the meaning of 'probable cause' in the Act of 1939 and 'illegal search and seizure' in the Bouse Act, we therefore must hark

> back to the common law as embodied by construction, in the Fourth Amendment. As Chief Justice Taft has shown, the concept of 'probable cause' is essentially similar with respect to searches and seizures and in malicious prosecution and false imprisonment cases. Carroll v. United States, supra, 267 U. S. at page 161, 45 S. Ct. 280, 69 L. Ed. 543, 39 A. L. R. 790. In all these classes of cases the concept was a familiar one at the time of the adoption of the Constitution. From this wide field have come definitions which have been followed under the Fourth Amendment. Such definitions have already been reviewed and followed by this Court. Goodman v. State, 178 Md. 1, 8-10, 11 A. 2d 635; Allen v. State, 178 Md. 269, 275, 278, 13 A. 2d 352; Frankel v. State, 178 Md. 553, 557, 16 A. 2d 93; Riley v. State, 179 Md. 304, 311-313, 18 A. 2d 583; Foreman v. State, 182 Md. 415, 35 A. 2d 171."

If the opinion of the Court of Appeals of Maryland in the instant case is allowed to stand, it will deprive the petitioners of fundamental rights which are regarded as of the very essence of Constitutional liberty. The Court of Appeals has subverted the rights and protection guaranteed by Article 26 of the Declaration of Rights and which were previously protected by the said Court in the cases cited above. It has also denied petitioners the protection guaranteed by the Fourteenth Amendment to the Constitution, in that it deprived them of due process of law.

WHEREFORE petitioners respectfully submit that the search warrant was wrongfully and illegally issued in violation of the rights guaranteed to petitioners under Article 26 of the Declaration of Rights of Maryland, and contrary to the provisions of Section 306 of Article 27 of the General Laws of Maryland and in deprivation of their rights under the Fourth Amendment to the Constitution of the United States. Petitioners submit that they have been denied a

fundamental right by the State of Maryland and this denial brings petitioners within the purview of the due process clause of the Fourteenth Amendment to the Constitution of the United States and a Writ of Certiorari should issue.

Respectfully submitted,

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IN THE

Supreme Court of the United States

No. 521

MARGARET E. SMITH
and
RUTH SCHUCHMAN,

Petitioners,

vs.

STATE OF MARYLAND,

Respondent.

BRIEF OF THE STATE OF MARYLAND IN OPPOSITION

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OPINION BELOW

The opinion of the Court of Appeals of Maryland has not yet been reported officially. It may be found, however, in 65 A. 2d (Adv. Shts.) 287 (1948); and a certified copy thereof is appended to the transcript of record filed in this Court.

JURISDICTION

The judgment of the Court of Appeals of Maryland sought to be reviewed was entered on November 10, 1948. The petition for a writ of certiorari was filed on January 25, 1949.

The jurisdiction of this Court is sought to be invoked under Section 1257(3) and Section 2106 of Revised Title 28, United States Code Annotated. It should be noted that Section 2106 of Title 28 relates only to the authority of this

Court in the determination of any judgment, decree or order of a court "lawfully brought before it for review". Jurisdiction, if any, must, therefore, exist under Section 1257(3) of Revised Title 28.

The Petitioners state that, in their motion to quash the search warrant and to suppress the evidence obtained thereunder, which was filed in advance of the trial of the case, they alleged that there had been a denial of their rights under the Constitution of the United States. In that motion, the Petitioners alleged only that their rights under the Fourth Amendment to the Constitution of the United States and the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States were violated. In the Court of Appeals of Maryland, as appears from the Petitioners' briefs filed in that Court, the contention was made that the Petitioners' rights under the Fourth and Fifth Amendments to the Constitution of the United States were violated. No mention was made of the Fourteenth Amendment to the Constitution of the United States nor was any contention based thereon. *In this Court, for the first time, the Petitioners contend that the rights guaranteed to them under the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States were violated.*

QUESTIONS PRESENTED

The Petitioners contend: (1) that the showing of probable cause to believe that a crime was being committed was insufficient to authorize and justify the issuance of a search warrant, (2) that the search warrant was a general search warrant, (3) that the search warrant did not authorize a search of a rented room in the described premises, (4) that the Petitioners were deprived of "fundamental rights" guaranteed to them by the Fourteenth Amendment to the Con-

stitution of the United States, and (5) that the guarantees under the Maryland Declaration of Rights alleged to have been denied, being in *pari materia* with the guarantees under the Fourth and Fifth Amendments to the Constitution of the United States, cannot be abrogated by the State of Maryland.

The Respondent contends that none of the contentions made by the Petitioners raises any Federal questions, and that, under the undisputed facts in the case, the evidence upon which the Petitioners were convicted was not obtained under the warrant about which they complain. Therefore, the following questions are presented:

I.

Have the Petitioners Shown the Violation of any Federal Rights?

II.

Do the Undisputed Facts Show that the Evidence upon which the Petitioners were Convicted was Obtained under the Search Warrant which they Attack?

STATEMENT OF FACTS

Nowhere in the petition for certiorari or in the brief in support of that petition are the facts in the case at bar set forth. The record discloses that the following took place:

The Petitioners, together with a third Defendant, were indicted for unlawfully making and selling books or pools on horseraces and for keeping a house for the purpose of betting and gambling in violation of the laws of the State of Maryland. They waived a jury trial and were tried upon their pleas of not guilty. They were convicted and sentenced to pay a fine of $1,000 each and costs, while the third Defendant was found not guilty and discharged.

Prior to the trial of the Petitioners' case in the Criminal Court of Baltimore, the Petitioners filed a motion to quash the search and seizure warrant and to suppress all of the evidence and property alleged to have been obtained thereunder. No separate hearing was held on this motion. Their motion was overruled, and the Petitioners objected to the use of any of the information or property as evidence during the course of the trial. These objections were also overruled. However, the Petitioners were given an opportunity at the conclusion of the State's case to move that all of the evidence relating to the information and property alleged to have been obtained under the search warrant be stricken from the record. This motion likewise was overruled.

At the Petitioners' trial it was shown that on January 13, 1947, about 4:00 o'clock in the afternoon, Captain Alexander L. Emerson, of the Baltimore City Police Department, with other members of his force, in execution of a search warrant theretofore obtained from an Associate Judge of the Supreme Bench of Baltimore, entered the premises at 430 East 20th Street, Baltimore, Maryland. In accordance with the procedure set forth in Section 306 of Article 27 of the Annotated Code of Maryland (1939 Edition), the warrant had been obtained on the affidavit of probable cause of Captain Emerson of the Department of Police of Baltimore City upon the observations of Officer Gerald Dolan.

The affidavit set forth, in substance, that Officer Dolan had watched the premises at 430 East 20th Street, Baltimore, Maryland, on July 9 to July 12, 1948, inclusive, and that on these four days, with the exception of July 11, 1948, which was Sunday, the officer observed, between the hours of 12:00 o'clock noon and 1:00 P. M. a white man described as forty-two years of age, about five feet nine inches tall,

weighing about one hundred sixty-five pounds and carrying an Armstrong scratch sheet and a Daily Racing Form walk east on 20th Street, and upon reaching the said premises hesitate momentarily and act suspiciously by looking about as if to ascertain if he were being watched and followed, and then enter the premises. Between the hours of 5:00 P. M. and 6:00 P. M. on the aforesaid days, except Sunday, the Officer saw the said described man come out of the premises and hurriedly walk from the vicinity. The affidavit also set forth that the time at which the said described man entered the premises was prior to the post time of the first horserace and that the time at which he left the premises was a time when most bet taking activities conducted over the telephone had been concluded for the day. It was also alleged that the papers carried by the said described man are daily horserace publications generally used by bookmakers in the unlawful operation of bookmaking.

It was also set forth in the affidavit that the premises at 430 East 20th Street, Baltimore, Maryland, a three story brick dwelling house, were indicated in the October, 1947, issue of the Baltimore Telephone Directory as being equipped with a telephone—Hopkins 4453—listed to Kenneth W. Hughes, on the second floor. Officer Dolan, on January 12, 1948, at about 2:30 P. M., that is, a time after the said described man had entered the premises at 430 East 20th Street, called telephone number Hopkins 4453 and the telephone was almost immediately answered by a male voice which said "Hello". The Officer said: "This is Bill, give me five to win on Mumbo Jumbo in the 7th at Gulf Stream" and the said male voice replied "O.K., Bill, is that all?". The Officer answered "Yes", and the said telephone conversation was completed. It was further alleged in the affidavit that Mumbo Jumbo was the name of a horse

entered to run in the seventh race at Gulf Stream Park Race Track on the said date and in horserace parlance "five to win" means that five dollars is bet on the said horse.

Upon this affidavit, a Search and Seizure Warrant was issued by the Hon. Edwin T. Dickerson, Associate Judge of the Supreme Bench of Baltimore City, to Captain Emerson commanding him, with the necessary and proper assistance, to enter into the said premises at 430 East 20th Street and there diligently to search the said premises and all persons found on the said premises for rundown sheets, betting slips, etc., and all other paraphernalia used in the unlawful operation of gambling on races, and also the body of the said white man described as being about forty-two years of age, about five feet nine inches tall, weighing about one hundred sixty-five pounds and all other persons who may be found on the said premises who may be participating in bookmaking activities.

Accordingly, Captain Emerson, with other members of his force, executed the aforesaid search warrant by entering the premises at 430 East 20th Street, Baltimore, Maryland. In the execution thereof, Captain Emerson found the Petitioner, Margaret E. Smith, engaged in placing bets on horses contrary to law. No search was made of the person of the Petitioner, Margaret E. Smith, but the various paraphernalia used by her was seized. The Petitioner, Ruth Schuchman, was also found engaged in taking bets on horses contrary to law. No search was made of her person; but upon the request of Captain Emerson, she voluntarily emptied her pocketbook and gave him the contents thereof. The various racing paraphernalia on the telephone stand where the Petitioner, Ruth Schuchman, was working was also seized and used as evidence.

ARGUMENT

I.

THE PETITIONERS HAVE NOT SHOWN THE VIOLATION OF ANY FEDERAL RIGHTS.

The Petitioners contend that the search and seizure warrant violated their rights under the Fourth, Fifth and due process clause of the Fourteenth Amendments to the Constitution of the United States because: (1) the affidavit of probable cause upon which it was issued was made on information and belief of the affiant and did not show probable cause, and (2) the warrant was a general warrant in that it failed to describe the persons or premises to be searched with the necessary particularity.

Needless to say, the decision of the Court of Appeals of Maryland established, as a matter of State law, both statutory and constitutional, that this particular search warrant was issued upon an affidavit which did show probable cause. The Court also reaffirmed its prior decision in *Allen v. State*, 178 Md. 269 (1940), that the affidavit is sufficient if made on information and belief where the facts and sources of information on which belief is based are stated.

The decision further established that, as a matter of State constitutional law, the warrant was not a general warrant within the prohibitions against such warrants contained in the Maryland Declaration of Rights.

Further than this, this Court need not look because the Petitioners claim that rights protected by the Fourth, Fifth and Due Process Clause of the Fourteenth Amendments to the Constitution of the United States were denied them are answered by the well settled doctrines that the Fourth and Fifth Amendments to the Constitution of the United States have no application to the States and the conduct of

State officials acting under State law, and that such amendments were not made applicable to the States and State officials by the adoption of the Fourteenth Amendment. *Twining v. New Jersey,* 211 U. S. 78 (1908); *Weeks v. United States,* 232 U. S. 383 (1914); *Palko v. Connecticut,* 302 U. S. 319 (1937); *Feldman v. U. S. Oil & Refinery Co.,* 322 U. S. 487 (1943); *Adamson v. California,* 332 U. S. 46 (1947).

Twining v. New Jersey, supra, reaffirmed prior decisions beginning with *Barron v. Baltimore,* 7 Pet. 243, that the first ten Amendments, in themselves, are not operative on the States. It also held that the privilege against self incrimination guaranteed by the Fifth Amendment was not operative on the States and included within the scope of the protection of the due process clause of the Fourteenth Amendment.

Weeks v. United States, supra, dealt specifically with the contentions which the Petitioners make here. There, the Defendant was arrested by State police officers without a warrant at a railroad station in Kansas City, Missouri. At the same time, other State policemen went to the Defendant's home, searched it and took possession of various papers and articles found, all of which were used as evidence against the Defendant in a prosecution in a Federal Court for illegal use of the mails. The Defendant claimed that the evidence thus obtained could not be used against him since it was obtained in violation of the Fourth Amendment. In disposing of the contention, this Court said:

> "* * * What remedies the Defendant may have against them (State police officers) we need not inquire as the 4th Amendment is not directed to individual misconduct of such officials. Its limitations reach the Federal government and its agencies. * * *"

Twenty-three years later, in *Palko v. Connecticut, supra,* in holding that a conviction in a State court of murder in the first degree on a second trial of a criminal prosecution after a conviction of murder in the second degree had been set aside on an appeal taken by the State is not prohibited by the Fifth Amendment nor the Due Process Clause of the Fourteenth Amendment, this Court specifically pointed out that the Fourteenth Amendment does not make the Fourth Amendment applicable to the States or State officials acting under State law.

In *Feldman v. United States, supra,* it was held that the admission in a Federal Court of testimony previously given by him in civil proceedings in a State court does not deprive him of the protection of the Fifth Amendment. This Court pointed out that the first ten Amendments to the Constitution of the United States by their terms protect an individual only against invasion of civil liberties by the Federal Government whose conduct they alone limit. It was there pointed out that, even in a prosecution in a Federal Court, evidence secured through unreasonable search and seizure by State officials without participation by Federal officials is admissible in evidence, and its use is not prohibited by the Fourth and Fifth Amendments.

In *Adamson v. California, supra,* the applicability of the first ten Amendments to the Constitution as protection against State action was reconsidered. There, it was pointed out that those Amendments were adopted for the protection of rights of national citizenship. While those provisions protect an individual from Federal action, they are inapplicable to similar actions done by the States. The effect of the adoption of the Fourteenth Amendment was not to guarantee as such all Federal privileges or immunities protected by the Bill of Rights. In discussing this construction of the Fourteenth Amendment, the Court said:

"* * * As a matter of words, this leaves a state free to abridge, within the limits of the due process clause, the privileges and immunities flowing from state citizenship. This reading of the Federal Constitution has heretofore found favor with the majority of this Court as a natural and logical interpretation. It accords with the constitutional doctrine of federalism by leaving to the states the responsibility of dealing with the privileges and immunities of their citizens except those inherent in national citizenship. It is the construction placed upon the amendment by justices whose own experience had given them contemporaneous knowledge of the purposes that led to the adoption of the Fourteenth Amendment. This construction has become embedded in our federal system as a functioning element in preserving the balance between national and state power. We reaffirm the conclusion of the Twining and Palko Cases that protection against self-incrimination is not a privilege or immunity of national citizenship." (Footnotes eliminated.)

Specifically, the *Adamson* case held that neither the Fifth Amendment nor the due process clause were violated by the California rule which permits the disclosure of a former conviction to the jury to impeach the testimony of an accused who elects to testify, and further permits comment to be made to the jury upon an accused's failure to testify.

In the latest case involving the scope of the protection afforded by the Fourth Amendment, that of *McDonald v. United States,* ..... U. S. ....., (No. 36, October Term, 1948, decided December 13, 1948), the Court pointed out that the Fourth Amendment is a guarantee of protection against unreasonable search and seizure and extends to the innocent and guilty alike. And, the law provides as a sanction

against the flouting of this constitutional safeguard the suppression of evidence secured as a result of the violation *when such evidence is tendered in a Federal Court.*

These authorities demonstrate that the Petitioners' contentions are without merit. The Fourth and Fifth Amendments to the Constitution of the United States have no application to the actions of the police of the City of Baltimore in obtaining evidence upon which the Petitioners were convicted in a State court of a violation of State law relating to the making of pools or books on horseraces; nor are the Fourth and Fifth Amendments made directly applicable to such a situation by operation of the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States. Similarly, the protection of the Fourth and Fifth Amendments claimed here is not included among those fundamental rights protected by the Due Process Clause.

The Petitioners' contentions that they were denied due process of law because of an erroneous construction of State constitutional law and prior decisions by the Court of Appeals of Maryland is without merit, for as stated in *Buchalter v. New York*, 319 U. S. 427 (1943):

> "The due process clause of the Fourteenth Amendment requires that action by a state through any of its agencies must be consistent with the fundamental principles of liberty and justice which lie at the base of our civil and political institutions, which not infrequently are designated as 'the law of the land'. Where this requirement has been disregarded in a criminal trial in a state court this court has not hesitated to exercise its jurisdiction to enforce the constitutional guarantee. *But the Amendment does not draw to itself the provisions of state constitutions or state laws. It leaves the states free to enforce their criminal laws under such statutory provisions and common law doc-*

tries as they deem appropriate; and does not permit a party to bring to the test of a decision in this court every ruling made in the course of a trial in a state court." (Italics supplied, footnotes eliminated.)

II.

THE UNDISPUTED FACTS SHOW THAT THE EVIDENCE UPON WHICH THE PETITIONERS WERE CONVICTED WAS OBTAINED AS AN INCIDENT OF THEIR VALID ARREST.

The undisputed facts of record show that there was no search made under the warrant attacked here. The facts are that both Petitioners were found by the police actively engaged in a violation of the laws prohibiting the making and selling of books or pools on horseraces. Moreover, no search was made of the person of the Petitioner, Margaret E. Smith. The only search made of the Petitioner, Ruth Schuchman, was the search of her pocketbook made with her consent. Seizure of the racing paraphernalia was made not under the search warrant, but as an incident to the valid arrest of both Petitioners for crimes committed in the presence of the police.

It is submitted that, even if the guarantees of the Fourth, Fifth and Fourteenth Amendments have application to this case, the result is governed by *Harris v. United States,* 331 U. S. 145 (1947). Cf. *Johnson v. United States,* 333 U. S. 10 (1947); *Trupiano v. United States,* 334 U. S. 699 (1948); *McDonald v. United States,* ..... U. S. ..... (No. 36, October Term, 1948, decided December 13, 1948). It is recognized that the authority of the *Harris* case has application only to exceptional circumstances, but the facts of the case at bar bring it within its scope. Unlike the *Trupiano* case, there is no evidence that the existence of the racing paraphernalia was known to the police prior to the Petitioners' arrest. Unlike the *Johnson* and *McDonald* cases, the crime was committed in the actual presence of the police officers.

It is submitted that use of the evidence seized was permissible aside from the validity of the warrant because such evidence was validly obtained as an incident of valid arrest.

CONCLUSION

The writ of certiorari prayed for in the instant case should not issue because the Petitioners have not shown that any Federal right was denied them. Moreover, even if it be assumed that the Petitioners had a Federal right which should be afforded protection, they have not shown that the right was treated other than in accordance with the applicable decisions of this Court.

Respectfully submitted,

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